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IN THE

Supreme Court of the United States

JOSEPH SCHEIDLER, *ET AL.*, *Petitioners,*

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., *ET AL.*, *Respondents.*

OPERATION RESCUE, *Petitioner,*

v.

NATIONAL ORGANIZATION FOR WOMEN, INC. *ET AL.*, *Respondents.*

On Writs of Certiorari to the
United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER OPERATION RESCUE

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ABBREVIATIONS KEY

App.	Appendix
Br.	Brief
Cal.	States of California et al. (amici)
CIR	Center for Individual Rights (amicus)
DX	Defense Exhibit
FACE	Freedom of Access to Clinic Entrances Act (18 U.S.C. § 248)
JA	Joint Appendix
LLDF	Life Legal Defense Foundation (amicus)
NACDL	National Association of Criminal Defense Lawyers (amicus)
NOW	Respondents National Organization for Women, Inc., et al.
NYCDL	New York Council of Defense Lawyers (amicus)
Opp.	Brief in Opposition
OR	Petitioner Operation Rescue (No. 01-1119)

PA	Plaintiffs' Appendix in the Seventh Circuit
Pet.	Petition for Writ of Certiorari
PX	Plaintiffs' Exhibit
RA	Appendix to OR's Reply to Brief in Opposition (No. 01-1119)
RCRC	Religious Coalition for Reproductive Choice, et al. (amici)
RICO	Racketeer Influenced and Corrupt Organizations Act
Sch.	Petitioners Joseph Scheidler, *et al.* (No. 01-1118)
SSA	Scheidler Defendants' Supplemental Appendix in the Seventh Circuit
Tr.	Transcript of Trial

The core issues in this case are: first, whether private parties can obtain equitable relief under civil RICO; and second, whether a nonviolent protest sit-in, conducted without any attempt to obtain property, qualifies as predicate extortion under the Hobbs Act. The Seventh Circuit answered both these questions incorrectly and must be reversed. *See* OR Br.

RESPONSE TO NOW'S STATEMENT

The bulk of the evidence in this case addressed the pro-life sit-in movement of the late 1980's and early 1990's. This nationwide "rescue" movement involved thousands of people from all walks of life. Tr. 453, 1614. The movement was remarkable for its nonviolence: the jury here found only four acts *or* threats of violence against persons *or* property in over fourteen years of protests by thousands of people. *See* OR Br. at 5 n.10, 32 n.34. *See also* PA 103, 108, 114, 117, 128, 132, 138, 145, 150-51, 222, 332 (photos of "rescues"). A "violent" or "extremist" movement could never have had such drawing power or have maintained such an impressive absence of violent incidents.

While respondents NOW et al. ("NOW") refer to "121 predicate crimes," NOW Br. at 1, 3 & n.4, this inflated figure reflects quintuple counting. OR Br. at 5 n.9. As NOW concedes, the jury actually found only 25 nonviolent sit-ins[1]

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[1]NOW invokes Question 6 on the verdict form, OR Pet. App. 312a, as proving that none of the predicate acts were "mere" sit-ins. NOW Br. at 3, 50. NOW is mistaken. OR Br. at 4 n.8. In NOW's view, moreover, *no* sit-in is peaceful unless the participants "part like the Red Sea" whenever anyone wishes to pass. RA 27-28 (closing argument).

NOW refers some sixteen times in its brief to "blitzes" (or "blitzkrieg" tactics). Given that NOW used the term only once in its Seventh Circuit brief and thrice in its Brief in Opposition, this terminology *du jour* presumably reflects a desire to elicit an emotional response which will distract from the insubstantiality of NOW's legal claims. However, a "blitz" is *not* synonymous with a rescue sit-in. *See* J. Scheidler, *Closed: 99 Ways*

(continued...)

and four unidentified acts or threats of violence to any person or property. NOW Br. at 3 & n.4, 35 & n.45. *See* OR Br. at 4-5 & nn.7-10; OR Pet. App. 311a-12a.

NOW tries to paint pro-life rescuers as thugs and ruffians. NOW Br. at 2 & n.3. NOW's caricature bears scant resemblance to reality or to the record in this case, but rather represents an inflated portrayal of one side's testimony about isolated alleged incidents.

First, NOW relies on contested *evidence*, *not findings*.[2] NOW's allegations of violence were vigorously disputed at trial, and the jury plainly disbelieved most (possibly all) of NOW's more inflammatory factual allegations, *see* OR Br. at 5 n.10.[3]

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[1](...continued)
to Stop Abortion, Ch. 57, "Conduct a Blitz" (revised ed. 1993), pp. 231-33 (DX-2) (a "blitz" is a brief visit to a clinic waiting room to converse and distribute literature).

[2]Space does not permit a response to all of NOW's distortions of the record. For example, NOW claims that it was "common" for "PLAN to apply so much force to bodies pinned against buildings that glass doors and windows were cracked or damaged," NOW Br. at 2. To support this astonishing claim, NOW offers four citations. The first two citations both refer to the same incident where a "little piece of rubber" supposedly "popped out" of a glass door. Tr. 1445. The third citation is to another single incident in which a plastic window allegedly "began" to "bend and buckle" when abortion personnel and protesters were physically pressing against each other. Tr. 4816, 4824-25. NOW's fourth citation is to an incident where *police*, not pro-lifers, cracked a glass door by pushing it. PX 3B, p. 3. Thus, this "common" phenomenon turns out to consist of two alleged incidents out of fourteen years of protests nationwide.

[3]NOW prominently features one anonymous witness's claim that she was beaten by protesters at a Los Angeles "rescue" sit-in. NOW Br. at 2. This witness's testimony was almost certainly fabricated and perjurious. *See* Tr. 1527, 1530-31; SSA at 1348-1409. *See also* Corrected Reply Brief for Defendant-Appellant Operation Rescue, *NOW v. Scheidler*, Nos. 99-3076 et al. (7th Cir. May 10, 2000), p. 5 & n.1, Addendum at 1a-8a. Indeed, (continued...)

More importantly, the jury, over defendants' objection, was not required to specify what unlawful acts it found. OR Pet. at 7 & n.12. There is thus no basis for crediting NOW's speculation as to the evidence underlying the verdict.

Second, the provability of these isolated (*see* OR Br. at 32 n.34) alleged instances of misconduct are irrelevant to the purely legal questions presented, OR Pet. at 2-4.

Third, NOW's reliance, NOW Br. at 4-6 & nn.7, 11, upon "highly charged political rhetoric," *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 926 (1992), as a basis for liability in treble damages and injunctive restraints, is flatly inconsistent with the right to free speech. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Claiborne*, 458 U.S. at 928.

Fourth, the evidentiary litany NOW provides actually highlights the essential need for (and absence here of) precise jury findings, meaningful First Amendment limitations on liability, and adherence to the statutory elements of Hobbs Act extortion, in the context of extensive, overwhelmingly

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[3](...continued)
there was not a shred of testimony or evidence corroborating this anonymous witness's allegations of assault, despite the presence of crowds, numerous police, and media. Tr. 1342-44, 2941, 4642-46, 4695-99. *See also* SSA at 1364-92, 1406-08 (news coverage of the event).

The testimony of an employee about being "smashed" against the front doors of a building during a rescue, an incident NOW also features, NOW Br. at 2, appears quite false as well. Indeed, the opposite appears true: abortion facility agents physically abused the nonviolent sit-in participants. *See generally* Appendix in Support of Defendants' Motions to Dissolve the Injunction and Reopen the Court's Judgment under Fed. Civil Rules 60(b)(5)-(6), Vol. II, Tabs 18-29 (Dkt. 1462) (including declarations, photographs, and two videotapes of the "rescue" in question). (The petitioners' Rule 60(b) motions were not "denied as baseless," NOW Br. at 1 n.1. No court has so held, and NOW has never refuted petitioners' evidence that the challenged testimony was either mistaken or downright fabricated.)

nonviolent protest activities. This is a case *par excellence* of an attempt to impose *liability* -- strict liability at that -- *for association within a protest movement*. *None* of the named defendants was alleged to have committed the scattered incidents of physical abuse NOW recites, NOW Br. at 2 & n.3. Rather, nameless "PLAN members" -- NOW's code for any pro-life activist -- supposedly did it. NOW Br. at 2 & n.3, 5-6 & nn.9-10. NOW's (and the Seventh Circuit's) virtually limitless definition of "extortion" only aggravates this problem. Indeed, the notion that protest leaders should be held liable as felons and racketeers for incidents such as one woman's grabbing one person around the neck at one location during a large-scale demonstration, RA 6-10, or one man elbowing a policeman during a sit-in, RA 11-17, is astonishing. NOW's reliance on such incidents, Opp. at 2-3, despite their manifest insufficiency -- and unconstitutionality[4] -- as a basis for imposing associational liability, is quite telling.

ARGUMENT

I. RICO DOES NOT AUTHORIZE PRIVATE INJUNCTIVE RELIEF.

The text and history[5] of RICO's civil remedies provision, 18

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[4]The First Amendment does not tolerate imposing damages and injunctions against activists in a social movement, even leaders, merely because of what someone else supposedly did, especially when those misdeeds ran *contrary* to the leadership's directives. *Claiborne*, 458 U.S. at 925. *See* OR Br. at 2 (defendants embraced nonviolence; OR required pledge of nonviolence from "rescue" participants).

[5]The only legislative history NOW offers in support of its position is Representative Steiger's supposed statement that "[T]he bill as it now stands . . . may have this option [of equitable relief]." NOW Br. at 45 (purporting to quote 116 Cong. Rec. 35,347 (1970)). The only reason this stray statement appears even weakly to support NOW is because of the bracketed language NOW added. In its original context, Rep. Steiger was referring

(continued...)

U.S.C. § 1964, demonstrates overwhelmingly that RICO does not authorize private injunctive relief.[6] OR Br. § I; U.S. Br. § I. Indeed, in RICO, Congress borrowed from antitrust law precisely the remedial language this Court had held *not* to authorize private injunctive relief; at the same time, Congress did *not* borrow a separate provision of antitrust law that *did* authorize private injunctions. OR Br. at 11-13, 21; U.S. Br. at 9-13. Faced with this compelling evidence, NOW offers no persuasive arguments to the contrary.

A. NOW Ignores the Text and Structure of § 1964.

NOW's tactic is to ignore the plain differences between § 1964(b) -- which gives the Attorney General unqualified authority to "institute proceedings under this section" -- and § 1964(c) -- which gives a private party "injured in his business or property" the right to "sue therefor . . . and . . . recover threefold the damages he sustains . . . ." While § 1964(b) gives

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[5](...continued)
to the "option," not of obtaining *injunctions*, but of obtaining "proper redress." *See* OR Reply App. 1a (setting forth excerpt in context). Rep. Steiger, in the very next sentence, said he was "convinced" that the amendment he proposed, which authorized private injunctive relief, "will have the option," *id.* This statement makes perfect sense in reference to "proper redress" (a matter of opinion one can be "convinced" of), but makes no sense in reference to injunctive relief, which his (unsuccessful) amendment *explicitly* (not *arguably*) authorized. *See* 116 Cong. Rec. 35,346 (1970) (setting forth text of amendment). Moreover, NOW's reading of this isolated statement is impossible to reconcile with Rep. Steiger's own explicit public statements about the underlying bill's *failure* to provide for private equitable relief. OR Br. at 16-17.

[6]NOW repeats its claim that the Seventh Circuit was the first federal court of appeals to decide whether private parties could obtain permanent injunctive relief under RICO. NOW Br. at 36 & n.48. This is simply wrong. OR Reply to Opp. at 3-4 & n.5. Similarly erroneous is NOW's labelling as *dicta* the overwhelming consensus of lower courts against reading RICO to authorize private injunctive relief. *Id.* at 4 n.6.

an unqualified green light to the federal government to "institute proceedings," and thus to invoke the equitable relief specified in § 1964(a), the private treble damages provision of § 1964(c) does no such thing. Rather, it sets forth a private right to sue for a particular remedy, namely, treble damages. *See* OR Br. at 9-11, 20-23. The language and structure of § 1964(b) and § 1964(c) are distinct, not parallel.[7]

B. NOW Has No Persuasive Answer to the Antitrust Analogy.

NOW cannot deny that the Sherman and Clayton antitrust statutes served as the models for RICO's remedial sections. *See* OR Br. at 13. Instead, NOW takes mutually inconsistent tacks in an effort to minimize the analogy between antitrust and RICO remedies.

On the one hand, NOW denies that this Court ever held that private injunctive relief was unavailable under the Sherman Antitrust Act. Rather, NOW dismisses the pertinent decisions as turning on standing. NOW Br. at 41-42. This is simply inaccurate. *See Minnesota v. Northern Sec. Co.*, 194 U.S. 48, 70-71 (1904) ("We cannot suppose it was intended that the enforcement of the act should depend *in any degree* upon original suits in equity instituted by the states or *by individuals* to prevent violations of its provisions") (emphasis added);

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[7] NOW relies (ironically) on the arguments of Professor G. Robert Blakey, former counsel for the Scheidler defendants. NOW Br. at 41 n.53, 43 n.55. The substance of those arguments is met in the petitioners' briefs. For a sharp critique of Blakey's analyses on this issue, *see Kaushal v. State Bank of India*, 556 F. Supp. 576, 581-84 (N.D. Ill. 1983).

Quoting Blakey, NOW argues that to read the grant of a private treble damages action in RICO § 1964(c) not to include a grant of injunctive relief is to convert "addition" into "subtraction." NOW Br. at 41 n.53. But before § 1964(c) was added, there was no private remedy under RICO at all. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 486-87 (1985). One cannot "subtract" what was never there.

Paine Lumber Co. v. Neal, 244 U.S. 459, 471 (1917) ("a private person cannot maintain a suit for an injunction under § 4 . . . even if . . . special damages [are] shown"). *See also* U.S. Br. at 10 & n.4 (listing additional cases).

On the other hand, NOW admits that this Court held that private injunctive relief is unavailable under the Sherman Act, NOW Br. at 42, but credits this to language making it the government's "duty" to institute proceedings, *id.* This argument suffers from two obvious defects. First, neither *Northern Securities* nor *Paine Lumber* used any such rationale for their holdings. And second, whether the government has the *duty* (as in the antitrust statutes) or merely the *power* (as in RICO) to "institute proceedings" is wholly irrelevant to the question whether *private parties* can obtain such relief.

NOW's essential position is facially implausible. NOW identifies as "important textual differences," NOW Br. at 42, such minutiae as use of the phrase "shall be the duty" as opposed to "may" (regarding the *government's* pursuit of equity relief), and the division *vel non* into separate subsections of provisions conferring jurisdiction and authorizing federal government pursuit of equitable relief. *Id.* Yet NOW finds no significance in the *inclusion* of a provision granting private equitable relief in the Clayton Act and the *omission* of precisely such a provision in RICO. *Id.* at 42-43. NOW has strained at gnats and swallowed the proverbial camel.

C. The "Inherent Equitable Power of Courts" is Not a License to Disregard Congressional Selection of Remedies.

Recognizing the weakness of its statutory construction arguments, NOW invokes the "inherent equitable powers," NOW Br. at 39, that courts have "'absent the clearest command to the contrary from Congress,'" *id.* at 36 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979)) (brackets omitted). This argument, however, relies on statements torn out of context.

There are at least two separate strands of remedies jurisprudence in this Court. One strand -- the strand NOW invokes -- addresses those situations where a private right of action exists either expressly (as in *Califano*, 442 U.S. at 698 n.12 ("a party . . . may obtain a review of such a decision by a civil action") (quoting statute)) or by implication (as in *Franklin v. Gwinett County Public Schools*, 503 U.S. 60 (1992) (Title IX)), but no particular remedies are spelled out. The second strand -- which NOW largely ignores -- address those situations where, as with RICO, Congress *has* specified remedies, but a litigant wants *additional* remedies read into the statute. *See* OR Br. at 10-11 (listing cases). In this latter situation, the "carefully integrated civil enforcement provisions found in . . . the statute . . . provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985). NOW's invocation of cases from the wrong line of authority is "inapposite," *Franklin*, 503 U.S. at 69 n.6 (distinguishing the lines of cases).[8] In reality, NOW is simply repeating a *dissenting* argument this Court already rejected in the context of the Sherman Act. *See Paine Lumber*, 244 U.S. at 473 (Pitney, J., dissenting) ("I dissent from the view that complainants cannot maintain a suit for an injunction, and I do

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[8]The authorization of civil RICO remedies is not one of those "powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others," *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (internal quotation marks and citations omitted). *See also Pennsylvania Bureau of Corrections v. United States Marshal Serv.*, 474 U.S. 34, 43 (1985) ("Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling"). That RICO's remedies are in addition to remedies available under other sources of law, NOW Br. at 39, is irrelevant: here, the only remaining cause of action is civil RICO.

so not because of any express provision in the act authorizing such a suit, but because, in the absence of some provision to the contrary, the right to relief by injunction . . . rests upon settled principles of equity that were recognized in the constitutional grant of jurisdiction to the [federal] courts . . .").

D. Policy Judgments are for Congress, Not Courts.

Finally, NOW offers various policy arguments for why private parties "need" equitable relief under RICO.[9]

There are weighty policy arguments *against* empowering private parties with injunctive relief under RICO as well. *See* OR Br. at 24; U.S. Br. at 14-15; LLDF Br. at 6-12. *Cf. Minnesota v. Northern Sec.*, 194 U.S. at 171 (reserving injunctive relief to Attorney General ensures "uniform plan" of equitable enforcement).[10]

The injunction in the present case perfectly illustrates the abuse that can result from private pursuit of RICO injunctions: rather than enjoining violations of RICO, *cf.* 18 U.S.C. § 1964(a), this injunction enjoins such things as trespass, vandalism, and obstruction, OR Pet. App. 270a-271a.

But the short answer is that policy considerations are for

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[9]Belying the supposed need for an injunction here, NOW never requested a preliminary injunction despite the twelve years this case took to get to trial, and NOW has taken no enforcement action since the permanent injunction issued, NOW Br. at 12. NOW conceded there is little practical need for RICO injunctions against abortion protests because "FACE provides broad relief and is simpler to navigate." Opp. at 15. *See also* LLDF Br. § III (documenting countless injunctions already issued locally).

[10]Moreover, there is no special *need* for RICO injunctions, given the wealth of alternative state and federal sources for injunctive relief in the average case. Ironically, even NOW's amicus Motorola does not need injunctive relief under RICO. *Motorola Credit Corp. v. Uzan*, 202 F. Supp. 2d 239, 243 (S.D.N.Y. 2002) ("Motorola has an independent entitlement to injunctive relief under its state law claims"). The court in that case only reached the issue of equitable relief under RICO because Motorola's co-plaintiff, Nokia, failed to bring a claim under any other law. *Id.*

legislatures, not courts. "The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *California v. Sierra Club*, 451 U.S. 287, 297 (1981).[11] "The debate concerning this formidable power . . . should be conducted and resolved where such issues belong in our democracy: in the Congress." *Grupo Mexicano de Desarollo v. Alliance Bond Fund*, 527 U.S. 308, 329 (1999).

II. NOW HAS ABANDONED THE THEORY ON WHICH THE JUDGMENT BELOW RESTS.

NOW has apparently lost confidence in its own arguments, as NOW distances itself from the theory NOW took to the jury and convinced the Seventh Circuit to embrace. But NOW cannot substitute a new theory *post hoc* in order to salvage a jury verdict rendered and affirmed on a different theory.

A. NOW Concedes that Nonviolent Sit-ins are Not Extortion.

For the first time, NOW concedes that a nonviolent sit-in

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[11]NOW credits the injunction in this case with having had salutary effects. NOW Br. at 1, 10. This assertion is without record support and is in any event quite irrelevant to the question whether injunctions are available to private parties under RICO. To the extent NOW would have this Court believe the injunction in this case put a halt to the national rescue movement, the clear indications are that it was the enactment in 1994 of FACE, 18 U.S.C. § 248 -- which made nonviolent pro-life sit-ins a federal crime -- that shut down the rescue movement. *See* United States General Accounting Office, *Abortion Clinics: Information on the Effectiveness of the Freedom of Access to Clinic Entrances Act* (GAO/GGD-99-2) (Nov. 1998); *1995 Clinic Violence Survey Report*, Feminist Majority Foundation, Chart 5 (reproduced at p. 9a of App. A to Amicus Brief of Feminist Majority Foundation in *Schenck v. Pro-Choice Network of Western New York*, No. 95-1065 (O.T. 1995) [FMF *Schenck* Br.]). (Indicative of the mindset of groups like NOW and FMF, the FMF report lists as "violence" not only pro-life rescues -- which it labels "blockades" or "invasions" -- but also "home picketing," FMF *Schenck* Br. at 2a, and even littering, *id.* at 7a ("disposal of trash on clinic property"). *See* OR Br. at 2 n.2.)

does not constitute extortion. NOW Br. at 3 n.5.[12] Contrary to NOW's insinuation that this concession is nothing new, *id.* (citing single ambiguous statement made at conference outside presence of jury), NOW's Johnny-come-lately admission conflicts directly with NOW's trial theory, which was that *any* interference with access to abortion qualified as extortion and racketeering. *See* OR Br. at 4 & n.7, 26 (citing transcript); OR Reply to Opp. at 1 n.1; RA 27-28. The Seventh Circuit, like the district court, affirmed this same expansive theory of extortion. OR Br. at 26, 29. NOW's concession, coupled with the jury's finding that most or possibly all of the sit-ins were nonviolent, OR Br. at 4 n.8, is tantamount to a concession that the jury verdict and judgment must be overturned.

B. NOW Concedes that Liberty Interests are Not Extortable "Property".

NOW concedes for the first time that liberty interests do not qualify as "property" for purposes of an extortionate "obtaining of property." NOW Br. at 13. *Accord* OR Br. at 39-42.[13] This concession also dooms both the judgment below and the underlying jury verdict. The jury was instructed that "property

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[12]NOW's own amici make this same concession. Cal. Br. at 8-9; Lawyers' Committee Br. at 1-2. *See also* RCRC Br. at 2 (peaceful civil disobedience "fundamental" to ethic of religious liberty); NARAL Br. at 7 (noting "our nation's long and proud history of civil disobedience").

[13]*See also* NYCDL Br. at 15:

> [A] woman's right of access to abortion services . . . cannot be "property" within the meaning of the Hobbs Act, any more than marrying a wealthy woman is "a source or element of wealth" for purposes of the Hobbs Act. Certainly no one would suggest that interference with or the prevention of such a marriage by the family of the woman could constitute obtaining property from a fortune-seeking spouse within the meaning of the Act. Interference with abortion rights . . . is, if anything, an even more attenuated or indirect "source or element of wealth."

rights" included such liberty interests as the "right to seek medical services," the "right . . . to perform [one's] job," and the "right . . . to provide medical services free from wrongful threats, violence, coercion and fear." JA 136. NOW argued that precisely such liberty interests were "extorted," Tr. 567 (opening statement),[14] and the Seventh Circuit rejected petitioner's contention that these liberty interests were not "property," OR Pet. App. 35a-36a. NOW's belated concession therefore requires reversal.

The United States as amicus defends as "property" only "the exclusive right to control the conduct of the business's operations," U.S. Br. at 23. Petitioners obtained no such "exclusive right of control" here. Moreover, the United States errs by equating such a right with the third liberty interest listed in the jury instruction. *Infra* p. 18.

The United States does *not* defend the first two parts of the "property" instruction, U.S. Br. at 15 n.6, which is presumably why the United States urges affirmance of a "holding" and not a "judgment," *id.* at 30. The defectiveness of the first two liberty interests, implicitly acknowledged by the United States, requires reversal even if the liberty interest in providing services "free from wrongful threats, violence, coercion and

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[14] *See also* Tr. 4987 (closing argument) ("Property rights include a woman's right to choose what to do when faced with an unplanned pregnancy"). NOW tries to dismiss such language as "simply surplusage," NOW Br. at 15 n.16, insisting that what really mattered was the patients' "contracts for medical services," *id.* at 4; *see also id.* at 10 ("fruits of their contracts"), 15 n.16 ("their contracts to exchange money for medical services"). But the jury was not instructed that it must first find the existence of a contract in order to find petitioners liable for extortion. NOW's contract theory is freshly concocted. Moreover, a holding that interference with contracts (which typically will entail "fear" of "economic injury" to someone, *cf.* JA 136) is "extortion" would improperly convert yet another class of state law civil actions into federal felony extortion and racketeering.

fear" were "property" under the Hobbs Act. OR Br. at 40 n.40.

NOW suggests that the instruction on the liberty interests of patients and employees would at worst be harmless error, as these liberty interests merge with those of the clinics. NOW Br. at 23 n.27. The notion that two of NOW's three "property" theories were mere surplusage not only strains credulity, it also ignores the dependence of the RICO claims NOW brings -- as an institutional representative and as representative of a class of women -- upon a showing of injury to the "business or property" of *women*, 18 U.S.C. § 1964(c); JA 145 (Q. 9), *not* of the *clinics*.

C. NOW Concedes that Impairment of Property is Not "Obtaining Property".

NOW concedes for the first time that *damaging* property is not the same as *obtaining* property as required for Hobbs Act extortion. NOW Br. at 24. *See also id.* at 30.[15] This concession is fatal to the judgment.

NOW's theory has always been that *interfering* with the use of "property" is the equivalent of *obtaining* that "property." *See* OR Br. at 4, 26. The courts below embraced precisely that understanding. *Id.* at 26, 29; OR Pet. App. 36a. Physically damaging or destroying property is the ultimate "interference" (albeit not "obtaining," *see* OR Br. at 29-39); by conceding that

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[15]NOW notes that New York had adopted a statute outlawing as "extortion" the forcing of another to "destroy" certain valuable documents. NOW Br. at 26. The fact that New York had to adopt this separate provision only proves petitioners' point: the extortion provision that was the predecessor of the Hobbs Act, *Evans v. United States*, 504 U.S. 255, 261 n.9, 264-65 (1992), did *not* by itself include coercion or the coerced destruction of (much less mere interference with) property. Were NOW's sweeping view of extortion correct, New York's separate statutory prohibition on forcing the destruction of documents would have been entirely duplicative. More to the point, Congress did *not* adopt this *separate* provision when it borrowed the language of the Hobbs Act from New York law.

the *destruction* of property is not an obtaining, NOW concedes *a fortiori* that the mere temporary *interference* with use of property (as here) is likewise not "obtaining," and thus not Hobbs Act extortion.[16]

D. NOW's Substitute Theory of Violence-Used-to-Control-Assets Cannot Salvage the Judgment.

The Seventh Circuit's sweeping holding that Hobbs Act extortion requires no more than "a loss to, or interference with the rights of, the victim," OR Pet. App. 36a -- which simply embraced NOW's theory of the case, *e.g.*, Tr. 5008 (respondents' closing argument) ("Even a few hours of deprivation of legal rights will satisfy the RICO act of extortion") -- is plainly indefensible. OR Br. § II(A); Sch. Br. § I. NOW therefore urges instead that this case is about an effort by "violence" to "obtain control over . . . valuable assets," NOW Br. at i, 12. NOW's recast theory cannot salvage the judgment here for several critical reasons:

First, NOW's invocation of "violence" is simply an unsupported smear tactic that cannot rehabilitate the judgment:

- Petitioners explicitly embraced nonviolence. OR Br. at 2. Indeed, OR insisted that all participants at OR events take a pledge of nonviolence. *Id.*
- The district court dismissed on summary judgment, as lacking an evidentiary basis, NOW's "strained" allegations about murder, arson, and kidnaping. OR Pet. App. 199a-201a.
- The jury did not find anything more than four isolated acts or threats of violence (including violence against

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[16]NOW errs when it contends that petitioners agreed that making someone "part with" property equals "obtaining" property. NOW Br. at 25 n.29. OR has argued to the contrary throughout this case. OR's attempt to work out agreed jury instructions in the face of the district court's repeated rejection of OR position, *see* OR Br. at 26, was not a waiver, and no party has suggested that it was.

property), by unnamed persons, out of an entire fourteen-year, nationwide host of anti-abortion "rescue" protests involving thousands of people. OR Br. at 2-3, 4 n.8, 5 n.10, 32 n.34.

- The jury instructions did not even require a finding of violence as a prerequisite to extortion. JA 136 ("fear" of "economic injury" suffices to satisfy element of "force, violence or fear").
- The Seventh Circuit's affirmance of the extortion counts did not even discuss, much less depend upon, "violence" as a distinguishing factor. OR Pet. App. 35a-36a.

In short, NOW's "violence" rhetoric is unfair, unfounded, and irrelevant.

Second, NOW's reinvention of its extortion theory as a claim that petitioners sought "the clinics' consent to Petitioners' exercise of control over the use of *all* clinic assets," NOW Br. at 25 (emphasis in original; footnote omitted), is simply an effort to switch -- or disguise -- theories on appeal. Again, this ploy cannot save the judgment:

- NOW never claimed or proved that petitioners sought to "take over" or "run" the abortion industry or any segment thereof, and NOW cites no record basis for such an outlandish notion.
- The jury instructions did not require a finding that petitioners sought an "extraordinary degree of ongoing control," Cal. Br. at 1. Rather, the jury had only to find that petitioners "or others associated with PLAN" sought to make clinics, staff, or patients "give up" a "property right." JA 136. This "giving up" of a "property right" could be a mere temporary interference with access. OR Br. at 4, 26 (citing transcript).
- NOW itself equates mere *interference* with or *influence* on a business with what it now labels "control over . . .

valuable assets," *see* NOW Br. at 22 (misconduct "designed to change business decisions" form the "core" of extortion), 24 (make a business "abandon lawful uses"), 27 ("loss to the victim" is the gravamen of extortion). Hence, even under NOW's recast category of extortion, any protest that crosses into illegality -- such as a temporary or obstructive sit-in, no matter how peaceful -- would be "designed to change business decisions," NOW Br. at 22, and thus would qualify as felony extortion. *Accord* LLDF Br. at 4 ("The Hobbs Act becomes a prosecutorial Deluxe Swiss Army Knife, useful in just about any situation").

- The jury instructions did not limit extortion to the "control" of "valuable assets," NOW Br. at 12, but instead swept into the definition of "property rights" such intangible liberty interests as

> anything of value, including a women's right to seek medical services from a clinic, the right of the doctors, nurses or other clinic staff to perform their jobs, and the right of the clinics to provide medical services free from wrongful threats, violence, coercion and fear.

JA 136.

In short, NOW seeks affirmance of a theory that is *not* the one on which liability was imposed and affirmed. Even if NOW's theory were sound -- which it is not -- it could not save the judgment from reversal.

E. <u>NOW's Expansive Definition of "Property" Cannot Salvage the Judgment.</u>

NOW expends considerable effort arguing that the conduct of a business is a form of "property" obtainable for purposes of Hobbs Act extortion. NOW Br. at 13-23. *See also* U.S. Br. at 15-21. The Scheidler defendants marshal an impressive showing to the contrary. Sch. Br. at 18-35. This is an

important legal question, but whichever side has the better argument, the judgment at issue here must be overturned.

First, assuming *arguendo* that running a business is "property," no such property was *obtained* here, as required for extortion. OR Br. at 29-39. Emblematic of NOW's theory is the Second Circuit case of *United States v. Tropiano*, 418 F.2d 1069 (2d Cir. 1969), *cert denied*, 397 U.S. 1021 (1970), in which the defendants threatened violence in order to push a garbage removal company out of certain territory. But in *Tropiano*, the defendants were *competitors* who wanted the garbage collection business in that area *for themselves*. In other words, defendants sought by threat of violence to *obtain the market share from their competitors*. Whether the Second Circuit was correct in deeming this an "obtaining of property" is entirely irrelevant here, because in the present case no one claims that petitioners sought to muscle their way into a share of the abortion market.[17]

Second, even if "business" were a form of property that could be obtained," there is a world of difference between *taking over* a business and merely *interfering* with it. NOW obliterates this distinction, equating the protester who insists, "Stop selling animal furs," with the mobster who runs a captive furrier executive from the shadows. NOW Br. at 13. This, however, would render all technically unlawful protest methods (sit-ins, for example, or political graffiti) extortionate. *See* OR Br. at 26-29, 41. The United States concedes as much. U.S. Br. at 28-29 ("sit-ins and other protest activity that disrupt businesses" constitute "extortion, [but] not robbery"). This limitless theory of "obtaining property" must fail. OR Br. § II.[18]

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[17]NOW's faulty theory would equate environmental protesters, seeking to stop unsafe dumping practices, with the *Tropiano* mobsters.

[18]As one amicus shrewdly observes:

(continued...)

Third, the jury in this case was not instructed that property includes the right "to provide medical services," but rather the right "to provide medical services free from wrongful threats, violence, coercion and fear," JA 136. This formulation reads the *means* element of extortion, 18 U.S.C. § 1951(b)(2) ("actual or threatened force, violence, or fear") into the "obtaining of property" element, *id.*, essentially negating the "obtaining of property" element. In other words, *any* use or threat of force, violence, or fear will *by definition* make someone "lose" the right to be free from the use or threat of force, violence, or fear. *Cf.* NACDL Br. at 11 ("the Hobbs act will have become a general crime of violence"). Thus, the jury was given a definition of property that was circular with the means element of extortion. The jury was *not* given an instruction that required the jury to find "property" as an independent element. Hence, the judgment cannot stand even under NOW's reworked theory of "property."

F. NOW's Other Extortion Arguments are Meritless.

NOW suggests that this Court has categorically rejected application of the rule of lenity to the Hobbs Act. NOW Br. at 32 n.41. The opposite is true. OR Br. at 49.

NOW offers no response to OR's argument that conduct typical of civil disobedience does not constitute "force, violence, or fear" under the Hobbs Act. OR Br. at 43-44. NOW also gives no response to petitioners' arguments based on the statutory construction rules of constitutional doubt and the requirement of a clear statement for federal intrusions into the

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[18](...continued)

> When courts can stretch the language of a law to make it encompass conduct which no reasonable person, not even a very imaginative reasonable person, would ever have dreamt of, and in so doing can increase the penalties for such conduct exponentially, then the rule of law has been gutted.

LLDF Br. at 5.

federalism balance. OR Br. at 46-48. Amicus Center for Individual Rights, by contrast, highlights yet another constitutional concern militating against an expansive reading of the Hobbs Act, namely, countervailing limits on the Commerce Clause power of Congress. CIR Br. at 16-18. *See also* Oestreicher, *Scheidler Meets Morrison (at the Entrance to a Health Clinic)*, 35 Creighton L. Rev. 693 (2002).

In its opening brief, OR emphasized that NOW has never claimed to be able to prove extortion under a proper understanding of the Hobbs Act, OR Br. at 49, and that petitioners are therefore entitled, not just to a new trial, but to judgment in their favor on the Hobbs predicates, *id.* NOW has not contested this. Instead, NOW argues that its *state* extortion predicates suffice to support the judgment. NOW Br. at 33-36. NOW is mistaken. OR Pet. at 23-26.[19] Tellingly, NOW's arguments in support of the state predicates simply echo NOW's faulty Hobbs Act theory. NOW Br. at 34-35. Rejection of NOW's Hobbs Act theory *requires* rejection of NOW's state law extortion claims because, as NOW's amicus concedes, Former Federal Prosecutors Br. at 13-14, both Hobbs Act extortion (18 U.S.C. § 1951(b)(2)) and the federal generic extortion definition (taken from *United States v. Nardello*, 393 U.S. 286 (1969)) are indistinguishable. State crimes must satisfy the

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[19]NOW does not even try to defend the improper "generic state extortion" instruction the district court gave in lieu of instruction on the particular elements of each pertinent state's extortion law. (The Seventh Circuit declined to reach this issue because it upheld the Hobbs Act claims. OR Pet. App. 36a-37a. Overturning the Seventh Circuit as to the Hobbs Act predicates puts the remaining state (and Travel Act) predicates squarely in issue.)

Instead of defending the generic state instruction, NOW recycles its claim that petitioners waived any objection to the generic state instruction. NOW Br. at 36 n.47. This "waiver" contention is demonstrably false. OR Reply to Opp. at 8-9; RA 18-23.

federal generic minimum elements to qualify as RICO predicates, OR Br. at 49-50; OR Pet. at 23-24; hence, failure to meet the Hobbs elements (aside from the interstate commerce element) means failure to meet the federal minima. OR Pet. at 24. (NOW's Travel Act Predicates, meanwhile, fall with the Hobbs and state extortion predicates. OR Br. at 50.)

CONCLUSION

This Court should reverse the judgment of the Seventh Circuit and remand with instructions to direct the entry of judgment for petitioners on all claims.

Respectfully submitted this 18th of October, 2002,

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APPENDIX:

116 Cong. Rec. 35,346-47
[excerpt]

[35,346]

MR. STEIGER of Arizona . . . .

. . . It is the intent of this body, I am certain, to see that innocent parties who are the victims of organized crime have a [35,347] right to obtain proper redress. It is a rather simple approach and one I am sure we can all support under the bill as it now stands they may have this option. I am convinced under the language proposed by this amendment they will have the option. Really, insofar as I am concerned it is just that simple.